RECENT DECISIONS.

ADMIRALTY—SALVAGE—INCIDENTAL BENEFIT RENDERED UNDER CONTRACT WITH THIRD PARTY. The defendant barque was forced aground by another vessel. Two tugs under contract with the other vessel towed her from the defendant barque, thus making it possible for three other tugs to get the defendant barque afloat. All five tugs claimed salvage. *Held*, the two under contract with the other vessel could not recover. *The Emilie Galline* [1903] 1 P. 106.

Authority is very meagre both in England and in the United States. That service performed for one vessel which incidentally results in benefit to another will not support a salvage claim against the latter was held in *The H. M. Hayes* (1861) 1 Lush. 355, 374; *Tuttle* v. *The Thomas Hilyard* (1893) 55 Fed. 1015; *The City of Columbia* (1893) 56 Fed. 252, and this would seem to be sufficient authority to support the principal case. The apparently contrary holdings in *The Woburn Abbey* (1869) 21 L. T., N. S. 707; *The Vandyck* (1881) L. R. 7 P. D. 42, may be distinguished from the cases previously cited on the ground that in the latter the services rendered were more direct than in the former.

AGENCY—APPARENT AUTHORITY—INTENTION TO BENEFIT PRINCIPAL. An agent signed a charter party ostensibly for his principal, the defendant, but in reality for the benefit of a third party. *Held*, the agent acted within the scope of his apparent authority and the defendant was bound. *Rainey* v. *Potter* (1903) 120 Fed. Rep. 651. An agent underwrote a policy of guaranty to the plaintiffs, acting ostensibly for his principal but in reality for his own benefit. *Held*, since the agent did not act in behalf of his principal he exceeded his authority and the principal was not bound. *Hambro* v. *Burnand* (1903) 2 K. B. 399.

In the first case the court finding that the agent was acting within his apparent authority regarded the question of benefit to principal as immaterial; in the second case the court said that since he was not acting for his principal's benefit the agent exceeded his authority. The second case follows the well-settled rule in England, which view is usually adopted in the Federal Courts and some of our State courts, viz.: that unless the act of the agent though authorized is for the benefit of the principal he is not bound. *Grant* v. *Norway* (1851) 10 C. B. 665; *Pollard* v. *Vinton* (1881) 105 U. S. 7; *Bank* v. *C. B. & N. Ry. Co.* (1890) 44 Minn. 224. But the better doctrine seems to be that of the first case, viz.: that if the agent is performing acts within the scope of his authority, actual or apparent, whether these be for the principal's benefit or not is peculiarly within the agent's knowledge and not chargeable to a third party. The plaintiff having shown that the act came within the apparent or actual authority, the agent's intention is immaterial. *N. Y., N. H. & H. Ry. Co.* v. *Schuyler* (1865) 34 N. Y. 30; *Bank* v. *Aymar* (1842) 3 Hill 262; *Wichita Bank* v. *Ry. Co.* (1878) 20 Kan. 519; *Sioux City Ry. Co.* v. *Bank* (1880) 10 Neb. 556.

ATTORNEYS—PURCHASE OF CLAIMS UNDER N. Y. CODE OF CIVIL PROCEDURE —TITLE OF SUBSEQUENT HOLDER. An attorney purchased a bond and mortgage with the intent and for the purpose of bringing an action thereon, although by the Code of Civil Procedure (§§ 73, 75) this is prohibited, and is made punishable as a misdemeanor. Said bond and mortgage were assigned by the attorney to his wife, who now brings suit to foreclose. *Held*, while the attorney himself could not enforce the security thus acquired, he can pass good title to a bona fide holder, or to one with full

knowledge of the prohibited purchase, and the courts will enforce such title, provided that its enforcement is not in fact in the interest of the attorney. *Beers* v. *Washbond* (1903) 83 N. Y. Supp. 993.

Although the provisions of the Revised Statutes (2 Rev. St. First Ed. pp. 288–9, pt. 3 c., 3 tit. 2, §§ 75, 81), allowing the defendant to set up a prohibited purchase as a good defense to an action brought by the attorney, were not re-enacted in the Code of Civil Procedure, such a defense is nevertheless recognized and upheld. *Browning* v. *Marvin* (1883) 100 N. Y. 144; *Maxon* v. *Cain* (1897) 22 App. Div 270. In order for the defense to prevail, however, it must be shown that the sole purpose of the attorney in purchasing the claim was to bring suit thereon. If such a purpose was merely secondary and contingent the defense cannot be sustained. *Moses* v. *McDavitt* (1882) 88 N. Y. 62. As the acknowledged object of the statutory enactments was to prevent attorneys from buying claims in order to obtain costs by prosecution, *Moses* v. *McDavitt*, supra; *De Forest* v. *Andrews* (1899) 27 Misc. 145, there seems to be no good reason for impeaching the title of such claims in the hands of third persons, who are not, in fact, suing in the interest of the attorney. The holding of the case is, therefore, entirely sound.

BANKRUPTCY—TRUSTEE'S RIGHT TO SURPLUS INCOME OF TRUST ESTATE. A trustee in bankruptcy sought to reach surplus income of a trust estate, to which a bankrupt was entitled. Under the laws of New York the right of the beneficiary could not be transferred (§ 83, Laws 1896, p. 574, c. 547), but could be reached in equity by a creditor's bill after return of execution unsatisfied. § 78, Laws of 1896, p. 573, c. 547. *Held*, the surplus does not vest in the trustee in bankruptcy under the provision in the Act of 1898, § 70, subd. 5, vesting in the trustee all property which the bankrupt could, by any means have transferred or which might have been levied on and sold under judicial process against him. *Butler* v. *Baudouine* (N. Y. 1903) 84 App. Div. 215.

This is a strict construction of § 70, subd. 5, of the Bankruptcy Law, confining its operation to expressly enumerated cases. Full force is given to the holding in *Dittmar* v. *Gould* (1901) 60 App. Div. 94, that the specified procedure to reach the surplus is exclusive. Precisely the opposite conclusion has been reached in a parallel case in the Federal court sitting in the Southern District of New York, in re *Baudouine* (1899) 96 Fed. 536, on the grounds of liberal construction with a view to effectuating the objects of the whole act, which would require the bankrupt to turn over in good faith all property subject in any way to the demands of any creditors. The latter case finds support in exhaustive dicta in a case in the Fourth Department, *Brown* v. *Barker* (1902) 68 App. Div. 594, which goes to the extent of stating a right of transfer in the beneficiary, notwithstanding the prohibitory statute.

CARRIERS—THEFT OF MONEY—LIABILITY OF CARRIER AND OF SLEEPING CAR COMPANY. A passenger in defendant's day coach, temporarily left on the window sill her purse, containing money not intended for travelling purposes, and it was stolen. *Held*, the defendant was not liable. *Levins* v. *N. Y. etc. R. Co.* (Mass. 1903) 66 N. E. 803.

A passenger in defendant's sleeping car left his money in a suit case beside his berth. On awakening he discovered it had been stolen. *Held*, the defendant was liable for the loss. *Morrow* v. *Pullman Co.* (Kas. 1903) 73 S. W. 281.

As the Massachusetts court points out, the liability of a carrier for assaults of its servants or others upon a passenger, as for a failure to protect the passenger, *Bryant* v. *Rich* (1870) 106 Mass. 180, has not been extended to cover failure to protect against theft of personal property not baggage, exclusively in the passenger's custody. *Weeks* v. *N. Y. etc. R. Co.* (1878) 72 N. Y. 50. Where it accepts custody of such property the carrier's liability is that of a bailee for hire, *Jordan* v. *Fall River Co.* (Mass. 1849) 5 Cush. 69, and this is the relation of a sleeping car company to personal effects, of its patrons, *Root* v. *Sleeping Car Co.* (1887)

28 Mo. App. 199, except, during the day, such as he may reasonably be expected to keep on his person. *Chamberlain* v. *Pullman Co.* (1893) 55 Mo. App. 474. These considerations dispose of the principal cases. In the first action the owner, retaining custody of her purse, the carrier assumed no liability. In the other case the defendant failed in its duty to maintain a reasonable watch. *Lewis* v. *Sleeping Car Co.* (1887) 143 Mass. 267.

CONSTITUTIONAL LAW—DEPRIVATION OF PROPERTY—POLICE POWER. Defendants were convicted on a charge of posting advertising bills upon a fence around vacant property adjacent to a park in violation of an ordinance of the Park Board of New York City prohibiting such acts unless a description or drawing of the advertisement be filed previously and a permit issued therefor. *Held*, the attempt of the statute to control the use of the property was a substantial appropriation of property without compensation, violating § 6 of Article 1 of the Constitution, which could not be justified as an exercise of police power. The Board could not forbid such use, and if it could not forbid, it could not make the use conditional upon obtaining its consent. *People* v. *Green* (N. Y. 1903) 85 App. Div. 400.

Property as defined here for purposes of constitutional limitation includes every lawful right of user which the owner may conceivably wish to exercise. Every limitation upon rights of user is pro tanto a diminution of the property, and as such a ground for the plea of invasion of constitutional right. This broad conception of the term has previously met with favor in the courts of New York. *People* v. *Otis* (1882) 90 N.Y. 48; *Matter of Jacobs* (1885) 98 N.Y. 98. No compensation being provided for this deprivation, the court had next to decide whether the ordinance was a valid exercise of police power. *Bent* v. *Emery* (1899) 173 Mass. 495. The object of the ordinance was to free the neighborhood of a public place from displays which might be displeasing to the sense of beauty or orderliness, and did not fall within the recognized scope of police legislation. The maintenance of a relatively uniform architectural effect in a public place will justify an appropriation of property by the state as for a public use if compensation be made, but the individual is not called upon to sacrifice any private right to the public's artistic sense. *Parker* v. *Commonwealth* (1901) 178 Mass. 199.

CARRIERS—REASONABLE REGULATIONS. Extra fare having been demanded of the plaintiff because he had no ticket, he refused to pay the excess on the ground that the ticket office was closed so that he was unable to procure a ticket. He was ejected from the defendant's train and in a suit for damages. *held*, he was not justified in disobeying the regulation and could not recover for the ejection. *Monnier* v. *R. R.* (1903) 175 N. Y. 281. See NOTES, p. 577.

CONSTITUTIONAL LAW—OHIO ANTI-TRUST ACT. Defendant was indicted under the Act of April 19, 1898 (93 O. L. 143 Sec. 4427-1 Rev. St. et seq.), which made criminal any combination or agreement between two or more persons that attempted to fix prices or limit competition among themselves, or between themselves and others. *Held*, a statute which makes criminal any agreement between two or more persons in any way limiting, or tending to limit, free and unrestricted competition, irrespective of whether such agreement infringes the legal right or safety of any individual, class of individuals, or of the public, is a violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the citizen of the right to acquire property by contract, without due process of law. *Gage* v. *State of Ohio* (1903) 24 Ohio Law Bulletin 224.

The court could have taken the view here that the statute was meant to apply only to contracts in unreasonable restraint of trade, thus following the dissenting opinion (per White, J.) in the case of *U. S.* v. *Freight Ass'n* (1897) 166 U. S. 290, or it might have held with the majority view in the same case, that the statute meant to apply to all contracts in re-

straint of trade, whether reasonable or unreasonable, at the same time limiting the term "restraint of trade," as is attempted in *U. S.* v. *Joint Traffic Ass'n* (1898) 171 U. S. 505. Evidently, however, the court thought that, with the sweeping statute before it, the former view would be a piece of judicial legislation, while the latter would lead to embarrassing and perhaps disastrous consequences. Unable, under this dilemma, to find any proper interpretation of the statute, which would not involve a sacrifice of rights guaranteed to the individual by the constitution, the court was justified in declaring the act unconstitutional. *Niagara Fire Ins. Co.* et al. v. *Cornell, State Auditor* et al. (1901) 110 Fed. 816.

CONTRACTS—BOND OF INDEMNITY. A contractor gave a city his bond for $10,000 as security for his paying any judgment obtained against both in a suit that had been instituted for injuries sustained through negligence in the performance of the contract work. By the terms of the original contract the contractor was bound to indemnify the city for all such suits. The plaintiff in the suit obtained a judgment for $22,000. An appeal was taken, but the city settled the suit against the protest of the contractor. In a suit on the bond, *held*, that the defendant was entitled to go to the jury upon the question whether or not the plaintiff acted in bad faith, and if so whether and to what extent the defendant was injured. *City of New York* v. *Baird* (1903) 30 N. Y. L. J. 375. See 2 COLUMBIA LAW REVIEW 498, criticising the decision in this case before the Appellate Division.

CONTRACTS—LIQUIDATED DAMAGES—AMOUNT AGREED UPON EXCESSIVE. Defendants were sued as sureties on a bond for the performance of a contract providing for the erection of a building, with a stipulation for damages to the amount of $25 a day for delay in completion. The Court found the actual damage to be about one-fifteenth of that sum. *Held*, the stipulation could not be upheld. *Lee* et al. v. *Carroll Normal School Co.* (Neb. 1901) 96 N. W. 65.

This result would be reached in any jurisdiction. But the rule laid down by the Court and by which the case is tested is much more strict than that usually applied. The Court says that no greater amount can be recovered as liquidated damages than the injured party "can show he has suffered within legal rules." The general rule is that as long as the stipulation is not unreasonable it will be enforced. (*Ward* v. *Hudson R. B. Co.* (1891) 125 N. Y. 230; *Poppers* v. *Meagher* (1893) 148 Ill. 192. If the damages are extremely hard to estimate, the latitude allowed in stipulating damages is widened. *Robinson* v. *Centenary Fund, etc.* (N. J. 1903) 54 Atl. 416; *Wolf* v. *Des Moines, etc., R. Co.* (1884) 64 Iowa 380; *Jaqua* v. *Headington* (1887) 114 Ind. 309. Contra, it would seem, to these cases is *Gillilan* v. *Rollins* (1894) 41 Neb. 540, cited as authority by the principal case.

CORPORATIONS—APPOINTMENT OF RECEIVER—DIRECTORS' RIGHT TO RESIGN. A stockholder brought an action against the corporation to have a receiver appointed under § 1810, subd. 3 New York Code, providing for the appointment of a receiver to preserve the assets of a corproration having no officer empowered to hold the same. All the directors had resigned, in order that this action might be instituted, as the corporation was in difficulties. *Held*, this was not the purpose of the statute, and the resignations were not effective to bring the case within it. (*Zeltner* v. *Zeltner Brewing Co.*) (1903) 174 N. Y. 247.

When the Court decides that the statute was not intended to provide for such a situation (see contra, *Smith* v. *Danzig* (1883) 64 How. Pr. 320 at p. 326 et seq.) that would seem to be sufficient to dispose of the case. But the court strengthens its position by showing that while a director has the right to resign, and that his resignation is effective without acceptance, *Manhattan Co.* v. *Kaldenberg* (1900) 165 N. Y. 1, at p. 10, his resignation is ineffective even though accepted, where the "immediate consequence would be to leave the interests of the company without proper care and protection," 1 Morawetz on Corporations, §563, and from

that concludes that the resignations are invalid, since they would always leave the interests of the company without such proper care. Since the directors remain directors the case does not come within the actual provisions of the statute ; its intent becomes immaterial.

CORPORATIONS—CONTRACT NOT UNDER SEAL—RECOVERY. The plaintiff rendered services to the defendant corporation as engineer in preparing plans for a sewerage system. In an action to recover for the services rendered, the defence was that there had been no agreement under the common seal of the defendant. *Held*, as the work had been done (1) at the request of the corporation, and (2) in respect to matters incidental to the purposes for which the corporation had been created, and (3) as the benefit had been accepted, a contract to pay would be implied, and the plaintiff could recover, *Lawford* v. *Billericay Rural Council* (1903) L. R., 1 K. B. 772.

The case is interesting, since it is another step in England, away from the common law rule that a contract by a corporate body requires a seal, a principle which the American courts long ago discarded. *Gottfried* v. *Miller* (1881) 104 U. S. 521, 527; *Leinkauf* v. *Calman* (1888) 110 N. Y. 50, 54. In England the courts have held that no seal is necessary when the contract is for work of a trivial nature, or where it relates to matters of frequent occurrence. To these two exceptions the principal case has added a third.

CRIMINAL LAW—REFUSAL TO FURNISH MEDICAL ATTENDANCE TO A MINOR. *Held*, §288 of the New York Penal Code, which makes it a misdemeanor for a person to wilfully omit to perform a duty by law imposed upon him to furnish medical attendance to a minor is constitutional. The term "medical attendance" means attendance by a person who is a regular licensed physician, under Laws 1880, chap. 513. *People* v. *Pierson* (N. Y., 1903) 68 N. E. 243. See NOTES, p. 574.

CRIMINAL LAW—SUSPENSION OF SENTENCE—LOSS OF JURISDICTION. Relator was found guilty of grand larceny April 12, 1900. On his motion, a continuance of his motion for a new trial was made, and he was discharged on his own recognizance. On October 31, 1902, his motion for a new trial was overruled, and on November 11, 1902, he was sentenced. *Held*, in view of the length of time elapsing between verdict and sentence the court had lost jurisdiction to impose sentence. *People* v. *Barrett* (Ill., 1903) 67 N. E. 23.

Except for well-defined reasons the court cannot suspend indefinitely the execution of a sentence already pronounced, since this is in effect a reprieve or conditional pardon. *In re Webb* (1895) 89 Wis. 354 ; *Neal* v. *State* (1898) 104 Ga. 509. But such an order being void, should not discharge the prisoner, any more than an unlawful act by the sheriff. *Neal* v. *State*, supra. In *People* v. *Court of Sessions* (1894) 141 N. Y. 288, it is held that an indefinite suspension of sentence does not amount to a pardon ; but even if it does, it is difficult to see how the court, by a void act, loses jurisdiction to correct its error. If a sentence is void, the defendant may be resentenced. *In re Bonner* (1893) 151 U. S. 242. No sufficient authority is found for the contention, in *People* v. *Court of Sessions*, supra, that at common law courts had power to indefinitely suspend sentence, though the practice is sanctioned in *Com.* v. *Dowdican's Bail* (1874) 115 Mass. 133, and in *People* v. *Patrick* (1897) 118 Cal. 332.

DOMESTIC RELATIONS—AGENCY OF WIFE FOR PURCHASE OF NECESSARIES. Defendant's wife to whom he gave a generous allowance for household expenses, without his knowledge pledged his credit for "necessaries," though she was well supplied with similar articles. *Held*, the husband was not liable. *Wanamaker* v. *Weaver* (N. Y. 1903) 68 N. E. 135.

This question though not new in other jurisdictions has never before been passed upon by the New York Court of Appeals. A wife is, in general her husband's agent for the purchase of household supplies. The

agency may be either express, implied in law, or implied in fact. It is implied in law, only when the husband, though able, refuses to support his wife, through no fault of hers, and another furnishes her with necessaries. If, however, he is willing to support her, her agency, if implied at all, is implied in fact and is governed by the general principles of agency. *Jolly* v. *Rees* (1864) 15 C. B., N. S. 628. The presumption, arising from the marital relation, that the wife is the husband's agent for the purchase of necessaries is held by all the authorities to be rebuttable if the husband shows that his wife was, in fact, supplied with similar articles or with the means of procuring them. *Debenham* v. *Mellon* (1880) L. R. 5 Q. B. D. 394; *Clark* v. *Cox* (1875) 32 Mich. 204; *Cromwell* v. *Benjamin* (1863) 41 Barb. 558; Schouler on Husband and Wife, § 107. This is the important point in the principal case. It would be interesting to know on what authority the majority of the Appellate Division of the Fourth Department reached the opposite conclusion, as, on this point, not a single case was referred to.

DOMESTIC RELATIONS—DOWER—EQUITABLE CONVERSION. A testator provided for the sale of all his property and its conversion into personalty, making no provision for his widow. *Held*, she was entitled to dower in the real estate and also to share in the proceeds of the real estate under the statute of distribution. *Hutchings* v. *Davis* (Ohio 1903) 67 N. E. 251.

It is evident that the widow was entitled to dower. *Konvalinka* v. *Schlegel* (1887) 104 N. Y. 125. The ground of the decision is that by the conversion the realty was made personalty for all purposes, hence for distribution. While the courts do speak of a conversion "for all purposes" by that expression they simply mean for all the purposes of the will. *Craig* v. *Leslie* (1818) 3 Wheat. 563. The case of *Dodson* v. *Hay* (1791) 3 Bro. C. C. 405 permits curtesy in personalty converted to realty, the court attempting to draw an analogy between such a case and the case of curtesy in the cestui's equitable estate in land. *Sweetapple* v. *Bindon* (1705) 2 Vern. 536 and note. But the court would have found small equity in bestowing curtesy, had distribution also been claimed. The cases of *Hoover* v. *Landis* (1874) 76 Pa. St. 454 and *Barnett's Adm.* (1858) 58 Ky. 254 are opposed to the principal case and point out the error of forcing a fiction to establish that property can be realty and personalty simultaneously for the same purpose.

EQUITY—PARTIAL ASSIGNMENT OF A CHOSE IN ACTION—INTENTION OF ASSIGNOR. *Held*, that a check drawn on a special fund amounts to an equitable assignment pro tanto of the fund and therefore the fact of its non-acceptance is immaterial. *Fortier* v. *Delgado & Co.* (C. C. A., 5th Cir. 1903) 122 Fed. 604. *Held*, a notice mailed to B that A has directed his debtor to pay B out of a special fund, operates from the date of mailing as an equitable assignment, and the bankruptcy of A before the receipt of the notice is immaterial. *Alexander* v. *Steinhardt, Walker & Co.* [1903] 2 K. B. 208. See NOTES, p. 581.

EQUITY—SUCCESSIVE ASSIGNMENTS OF CHOSE IN ACTION—PRIORITIES. Where one interested in a fund assigned his interest to two successive assignees, *held*, their priority was determined by the order in which they gave notice to the holder of the fund. Appeal of *Moses* (Pa. 1903) 55 Atl. 213. But where in a similar case a creditor of the assignor had attached the fund, between the dates of the two assignments, *held*, the priority of the claims must be governed by the order in which they arose. Appeal of *Trust Co.* (Pa. 1903) 55 Atl. 216. See NOTES, p. 581.

EVIDENCE—PRIVILEGE OF A WITNESS—SELF-INCRIMINATION. *Held*, a witness in any criminal trial may, under § 6, Art. 1 of the N. Y. Constitution, refuse to answer any question which tends to incriminate him, unless he is granted absolute immunity from prosecution. A guarantee that his testimony shall not be introduced as evidence against him in any subsequent proceeding is not sufficient. *People* ex rel. *Lewisohn* v. *O'Brien* (N. Y. 1903) affirming the decision of the Appellate Division in 81 App. Div. 81. See 3 COLUMBIA LAW REVIEW, 421.

INSURANCE—CHANGE OF BENEFICIARIES—EQUITIES ARISING FROM PAYMENT OF PREMIUMS. The insured under a mutual benefit contract gave the policy to the beneficiary saying, "If you pay the premiums up to the time of my death the certificate is yours absolutely", and beneficiary paid the premiums. *Held*, the member might thereafter change the beneficiary. *Spengler* v. *Spengler* (N. J. 1903) 55 Atl. 285.

The insured in a mutual benefit society gave the policy to the beneficiary, and after it had lapsed told her to continue the payments and she should have the benefit of the certificate. *Held*, the wife had an equity in the policy preventing the insured from subsequently changing the beneficiary. *Supreme Council* v. *Murphy* (N. J. 1903) 55 Atl. 497.

In the first case the court held that in the absence of a contract not to change the beneficiary, since she made the payment with knowledge of a right in the insured to make such change, no equity arose. This is opposed to the holding in the second case, unless the court, although no express contract was found, be understood to rest the equity in that case upon an implied contract. In the absence of a contract payment of premiums creates no equity in the beneficiary. *Fisk* v. *Equitable Aid Union* (Pa. 1887) 11 Atl. 84; Joyce on Insurance, § 742. Usually, however, an agreement, express or implied can be found. *Smith* v. *National Benefit Society* (1890) 123 N. Y. 85; *Jory* v. *Supreme Council A. L. H.* (1894) 105 Cal. 20.

INSURANCE—SUICIDE—BENEFICIARY'S RIGHT. The insured in a benefit society committed suicide. *Held*, his widow, the beneficiary, cannot recover on the policy since, having no vested right, but claiming through him, she should not benefit by his wrong. *Shipman* v. *Protected Home Circle* (1903) 174 N. Y. 399.

The court decides that suicide is expressly excepted from the risk in the policy, but says that in the absence of express terms the result would have been the same. The court limits the New York doctrine that suicide will not avoid the policy in the hands of the beneficiary, *Fitch* v. *American Popular Life Ins. Co.* (1875) 59 N. Y. 557, to policies wherein the wife has a vested right, expressly overruling *Darrow* v. *Family Fund Society* (1889) 116 N. Y. 537. This exception is not usually made. *Supreme Lodge* v. *Kutscher* (1897) 72 Ill. App. 462; *Kerr* v. *Mutual Benefit Association* (1888) 39 Minn. 174; Joyce on Insurance, §§ 2648–2661. While it is true that the beneficiary of a benefit insurance contract has no vested right during the life of the insured, *Supreme Conclave* v. *Capella* (1890) 41 Fed. 1; N. Y. Ins. Law § 238, it is difficult to see how such beneficiary benefits any more by the insured's wrong where the right is vested than where contingent, it being obtained through the insured in either case. The case of *Ritter* v. *Mutual Life Ins. Co.* (1898) 169 U. S. 139, cited in the principal case, was decided squarely on the ground, that suicide while sane is not a risk contemplated by the parties, and if consistently followed should preclude recovery whether the beneficiary's right is vested or contingent.

MORTGAGES—CLOG ON THE EQUITY OF REDEMPTION. The defendant mortgaged his shares in a tea company and collaterally agreed that he would always secure the employment by the company of the plaintiff, a tea broker. The mortgage was paid off and the company employed another broker. *Held*, the agreement constituted a clog on the equity of redemption and was not binding. *Bradley* v. *Carritt* (1903) A. C. 253. For a discussion of this question see 2 COLUMBIA LAW REVIEW, 331.

MORTGAGES—RIGHT OF MORTGAGEE OF SHIP TO FREIGHT. In an action of interpleader for freight the plaintiff claimed as assignee of the mortgagor of the vessel and the defendant as mortgagee in possession. *Held*, the plaintiff was entitled to the freight as it had been earned before the mortgagee took possession. *Shillito* v. *Biggart* (1903) 1 K. B. 683.

Although the point had not previously been settled by any direct authority the trend of the earlier English decisions is clearly toward the

rule here laid down. *Brown* v. *Tanner* (1868) L. R. 3 Ch. App. 597; *Keith* v. *Wyllie* (1877) L. R. 2 App. Cas. 636. The result follows logically from the holding that until the mortgagee takes possession, the vessel is to be regarded simply as collateral security for the debt. 1 Parsons on Shipping and Admiralty, 131. Till then he neither incurs the liabilities nor reaps the rewards of ownership. *Jackson* v. *Vernon* (1789) 1 H. Bl. 114; *Tenney* v. *Bank* (1865) 20 Wis. 161. The fact that the claim in the principal case remained uncollected until the mortgagee had taken possession clearly should not prejudice the assignee.

MORTGAGES—RIGHT OF THE SECOND MORTGAGEE OF CHATTELS TO MAINTAIN CONVERSION. Plaintiff, the second mortgagee of a stock of goods, assumed to go into possession while the first mortgagee was in possession under his mortgage. The action of the second mortgagee was not resisted by the first. The sheriff took the property under a writ of attachment, and the second mortgagee brought an action for the conversion of the goods. *Held*, his possession was sufficient to maintain the action. *Columbia Bank* v. *American Surety Co.* (N. Y. 1903) 84 App. Div. 487. See NOTES, p. 578.

PLEADING AND PRACTICE—STATUTE OF FRAUDS—DEFENCE UNDER GENERAL DENIAL. In two cases, one involving the promise of a wife to answer for the debt of her husband, *Indiana Trust Co.* v. *Finnitzer* (Ind. 1903), 67 N. E. 520, the other based upon a contract not to be performed within a year, *Rief* v. *Rübe* (Nebr. 1903) 94 N. W. 517, defendant put in general denial. *Held*, the Statute of Frauds might be availed of as a defence under that answer. See NOTES, p. 576.

QUASI-CONTRACTS—ILLEGAL INSURANCE POLICY—RECOVERY OF PREMIUMS. The plaintiff effected insurance with the defendant on his mother's life, relying on the representation of the defendant's agent that the probability of the plaintiff's having to pay his mother's funeral expenses was a sufficient insurable interest. The agent was honestly mistaken, the policy being illegal and void. *Held*, the plaintiff could recover the premiums paid. *Harse* v. *Pearl Life Assurance Co.* (1903) L. R. 2 K B. 92.

The court allowed the recovery on the ground that in forming the illegal contract the parties were not in pari delicto, as the plaintiff was entitled to rely on the representations of the agent as to matters of insurance law. The case would not seem to be one for the application of the rule in pari delicto. Keener on Quasi-Contracts, 259. Waiving this point, however, the difficulty remains that the plaintiff paid the premiums under a mistake of law and under the general rule could not recover. If upheld, the case furnishes another exception to that general rule. In *British Workman's Co.* v. *Cunliffe*, (1902) 18 T. L. R. 425, 502, relied on by the court, the agent knew that the plaintiff had no insurable interest and the Court of Appeal affirmed the case expressly on that ground.

QUASI-CONTRACTS—PLAINTIFF WILLFULLY IN DEFAULT UNDER CONTRACT. Where the plaintiff, without fault of the defendant, abandoned his contract for services as farm hand, *held*, the plaintiff could recover, on a quantum meruit, the value of such services, less the damage caused the defendant by his breach. *Murphy* v. *Sampson* (Neb. 1902) 96 N. W. 494. For a discussion of the principle involved, see 1 COLUMBIA LAW REVIEW 493.

QUASI-CONTRACTS—WAIVER OF TORT—DECEIT IN INDUCING CONTRACT NOT RESCINDED. A stockholder of one of two merging corporations misrepresented the value of the assets of that corporation, to be transferred for stock in merged corporation, securing more stock than he would have been entitled to upon a fair representation. The merged corporation sued for the value of stock to which he was not so entitled, he having sold the whole allotment. *Held*, there could be no recovery on count for money had and received. *Anderson Carriage Co.* v. *Pungs* (Mich. 1903) 95 N. W. 985.

Though hard to support on principle, this case is in line with the authorities. *Ferguson* v. *Carrington* (1829) 9 B. & C. 59; *Galloway* v. *Holmes* (Mich. 1844) 1 Doug. 330; *Bedier* v. *Fuller* (1898) 116 Mich. 126. The court holds that the bringing of the action upon a promise implied in law was inconsistent with the existing express contract, that owing to the doctrine of the entirety of contract no recovery could be allowed unless the original contract were wholly rescinded. A promise implied in law seems to be confused with one implied in fact, the latter of which the law never allows in case there is an express promise. The former is purely fictitious and should be allowed whenever the defendant holds that which equitably belongs to plaintiff whether through a pure tort or a tortious and fraudulent contract. Keener on Quasi Contracts, 198.

REAL PROPERTY—PERCOLATING WATERS—CORRELATIVE RIGHTS. In an action to restrain the malicious waste by defendant of the water of his artesian well, and the consequent interruption of the natural flow from plaintiff's well, *held*, (1) the defendant has a right to use the water percolating through his land as he pleases and such right is not affected by malicious intent. (2) A statute rendering the defendant liable for waste is unconstitutional as taking private property for private use without compensation. *Haber* v. *Merkel* (Wis. 1903) 94 N. W. 354.

The case follows the common law rule that the owner of land has a right to use water percolating through his land in any way he may elect. This is a property right incident to the ownership of the land. See 3 COLUMBIA LAW REVIEW, 109. Malice is immaterial. *Chatfield* v. *Wilson* (1855), 28 Vt. 49. The principal case is to be distinguished from the New York cases, which were exceptional in their facts, discussed in 1 COLUMBIA LAW REVIEW, 120, 505; 3 COLUMBIA LAW REVIEW, 425. It would be a great extension of the police power to hold the statute constitutional for the statute did not benefit the public but only the neighboring landowner.

REAL PROPERTY—SALE BY EXECUTOR—CAVEAT EMPTOR. An executor, in advertising the auction sale of a ground rent, innocently misdescribed it as "on the Calverton Stockyards." At the sale he innocently misrepresented that the ground was occupied by the firm of G. and J. *Held*, the misdescription and misrepresentation entitled the purchaser to rescind. *Doyle* v. *Whitridge* (Md. 1903) 55 Atl. 459.

The case is meagerly reported, but it would appear that the groundrent was regarded as real estate, and the sale, being made by an executor under order of court, as a judicial sale. It would seem, then, that the case should fall within the general rule that "in Maryland * * * as to all judicial sales, the rule caveat emptor applies." *Brown* v. *Wallace* (Md. 1830) 2 Bland 585; *Bolgiano* v. *Cooke* (1865) 19 Md. 375. If the principal case stands for the proposition that a purchaser from an executor is not bound by caveat emptor, it establishes for Maryland a rule opposed to the overwhelming weight of authority in this country. *Tilley* v. *Bridges* (1883) 105 Ill. 336; *Arnold* v. *Donaldson* (1888) 46 O. St. 73. None of the cases cited in the principal case present the question whether caveat emptor applies to sales by executors. *Tomlinson* v. *McKaig* (Md. 1847) 5 Gill 256 and *Keating* v. *Price* (1882) 58 Md. 532 refer to sales by trustees. *Rayner* v. *Wilson* (1875) 43 Md. 440 involves the construction of a contract. *Gunby* v. *Sluter* (1875) 44 Md. 237 holds that caveat emptor does not apply to a sale of real estate. It would be difficult to find any authority to support the last named case.

TAXATION—ASSESSMENT OF CAPITAL OF NON-RESIDENT PARTNERSHIP. Where a statute provided that non-residents doing business in the state as partners should be taxed on the capital invested in such business as personal property at the place where such business was carried on, *held*, that an assessment in the firm name was valid, the tax being against the property and not against the individuals owning it. *People* v. *Wells*

(N. Y. 1903) 85 App. Div. 440. The decision does not involve holding that the partnership may be treated as a legal entity for the purposes of the case; for the court, extending the principle widely recognized as applicable in the taxation of real property, viz.: that the property pays the tax, to personalty, concludes that a precise designation of the owners is not necessary under the statute in the absence of a provision requiring it, and the entry in the firm name is sufficient.

TORTS—PROXIMATE CAUSE—SUICIDE WHILE INSANE. The plaintiff was injured by the defendant's negligence. After some weeks he became insane, locked his bedroom door, twisted a napkin tightly around his neck, and held it so as to produce strangulation. *Held*, the voluntary, willful act of suicide of an insane person who knows the purpose and physical effect of his act, is a new cause, so that his death is not by reason of the negligence of defendant. *Daniels* v. *N. Y., N. H. & H. R. Co.* (Mass. 1903) 67 N. E. 424.

The question of proximate cause was decided the same way in *Scheffer* v. *Railroad Co.* (1881) 105 U. S. 249, though the two courts disagree as to whether moral appreciation of the act is necessary to relieve an insurance company where the policy contains a clause of exemption for "suicide." The latter question involves the intent of the parties in making a contract. Massachusetts is supported by the weight of authority in holding it to be suicide within the intent of the parties when the person is conscious of the probable consequence of his act, and did it for the express purpose of destroying himself. *Cooper* v. *Insurance Co.* (1869) 102 Mass. 227. In *Manhattan Life Insurance Co.* v. *Broughton* (1883) 109 U. S. 121, it is held that the person must appreciate the moral aspect of his act to make it suicide within the intent of the parties.

TRUSTS—TRUSTEE'S DUTY OF PRUDENT INVESTMENT. Trustees "with full power to make investments * * * in such manner as to them shall seem expedient" invested between a fifth and a quarter of the trust fund in stock and bonds of a railroad company. Later, in perfect good faith, and relying on the advice of persons whom they thought qualified to give advice, the trustees made further investments in the same securities. *Held* the trustees were personally responsible for the latter investments, as not made in the exercise of a sound discretion. In re *Day's Estate* (Mass. 1903) 67 N. E. 604.

A trustee to invest must act with good faith and sound discretion. *Harvard College* v. *Amory* (1830) 9 Pick. 446. The wisdom and fitness of the investment is to be judged as of the time when it was made, and not by subsequent events which could not then have been anticipated. *Brown* v. *French* (1878) 125 Mass. 410. Whether the trustee exercised the reasonable diligence, prudence and discretion required of him should be determined from the facts of each case. In the principal case that method was not used. Instead the court followed the mathematical rule of *Dickinson*, appellant (1890) 152 Mass. 184, that for any investment in excess of from a fifth to a quarter of the trust fund the trustee is personally liable. Previous Massachusetts cases do not demand the exercise of any such infallible judgment by the trustee. *Harvard College* v. *Amory*, supra; *Hunt*, appellant, (1886) 141 Mass. 515. See also *King* v. *Talbot* (1869) 40 N. Y. 76.

WILLS—CONTRACT TO DEVISE—PREDECEASE OF DEVISEE. A testator agreed to devise certain land to A in consideration of A's giving his promissory notes for $2,200 to testator's daughter. A gave the notes but died before the testator. The testator left a will in accordance with his contract. *Held*, the devise, on A's death, did not lapse. *Ballard* v. *Camplin* (Ind. 1903) 67 N. E. 505.

The decision may be reached in either of two ways: (1) by treating the case as an exception, because of the consideration given, to the doctrine of lapsed devises, or (2) on the theory that equity will specifically enforce the contract. The courts usually prefer the former treat-

ment, as shown by the analogous cases of a devise made to a creditor of the testator in consideration of the release of a pre-existing debt. *Cole* v. *Niles* (1874) 3 Hun 326; affirmed, 62 N. Y. 636. The authorities are numerous to the effect that equity will, as nearly as it can, specifically enforce a contract to devise, where the testator has died first but has made other disposition of his property. *Johnson* v. *Hubbell* (N. J. 1855) 2 Stockton 332; 66 Am. Dec. 773, with note collecting the authorities. When the contract is made, the promisee acquires an equitable interest in the property, just as if he had contracted to purchase. His death before that of the testator cannot affect this vested right. *Healy* v. *Simpson* (1892) 113 Mo. 340.

WILLS—RIGHT TO PROBATE IN SOLEMN FORM. The decedent's will was admitted to probate without notice being given to the parties interested. After the statutory period for appeal had passed, the petition of the decedent's widow was filed asking that the executor be directed to offer the will for probate after giving notice to the interested parties. *Held*, the petition should be granted. In re *Hodnett's Will* (N. J. 1903) 55 Atl.

The practice in the English Ecclesiastical Courts which had exclusive probate jurisdiction was that if the first probate of the will was in common form, i. e., without notice to the interested parties, any such party might at any time call upon the executor to prove the will in solemn form, i. e., with notice to all interested parties. *Finucane* v. *Gayfere* (1820) 3 Phillim. 405; *Blake* v. *Knight* (1843) 3 Curt. 547. This practice was recognized by most early American jurisdictions as a part of their common law. *Noyes* v. *Barber* (1828) 4 N. H. 406 at 412; *Etheridge* v. *Corprew's Executors* (N. Car. 1855) 3 Jones Law 14. The proceeding seems never to have been conceived of as an appeal. See *Waters* v. *Stickney* (Mass. 1866) 12 Allen, 1, 5.